

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

CONDALEE MORRIS,

Plaintiff,

vs.

M. BARRA; L. MILLS; D. WHITE;
G.J. JANDA; MACE; JANE DOE;
AND D. HUBBLE,

Defendant.

CASE NO. 10-CV-2642-AJB (BGS)

ORDER:

1. ADOPTING THE REPORT AND RECOMMENDATION OF THE MAGISTRATE JUDGE, (Doc. No. 284);
2. OVERRULING PLAINTIFF'S OBJECTIONS, (Doc. No. 289);
3. GRANTING DEFENDANT MACE'S MOTION TO DISMISS FOR FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES, (Doc. No. 249);
4. DENYING PLAINTIFF'S MOTION FOR DEFAULT JUDGMENT AGAINST DEFENDANT MACE, (Doc. No. 274);
5. DENYING PLAINTIFF'S REQUEST FOR REFERRAL TO MEDIATION PROGRAM, (Doc. No. 274).

Before the Court is the Report and Recommendation ("R&R") of Magistrate Judge Skomal, recommending this Court (1) GRANT Defendant Mace's motion to dismiss Plaintiff's Third Amended Complaint ("TAC"); (2) DENY Plaintiff's motion for default judgment against Mace; and (3) DENY Plaintiff's stipulation to request

1 court to refer case to pro se mediation program. (Doc. No. 284.) After some initial
2 confusion as to whether Plaintiff received a copy of the R&R, Plaintiff filed an
3 Objection to the R&R on November 12, 2013. (Doc. No. 289.) Though untimely, the
4 Court nevertheless considers the Objection as Plaintiff is incarcerated and proceeding
5 *pro se*.¹ Mace filed her Reply on November 15, 2013. (Doc. No. 290.)

6 **I. BACKGROUND**

7 Plaintiff is a state prisoner proceeding *pro se* and *in forma pauperis*. On April
8 12, 2012, Plaintiff filed his TAC alleging claims under 42 U.S.C. § 1983, and
9 specifically a violation of his Eighth Amendment right to adequate medical care against
10 Mace. (Doc. No. 138 at 1). Plaintiff's claim against Mace arises out of an encounter
11 he had with Defendants Mills and Barra on August 12, 2010, and the subsequent
12 medical care he received from Mace. Plaintiff alleges that Defendant Mace witnessed
13 an assault by Barra on him in the "B" yard clinic on August 12, 2010. (*Id.* at 10.)
14 Plaintiff also complained to Mace about a sexual assault on him committed by Mills
15 and Barra. (*Id.*) However, Barra interfered with Mace's job, causing Mace to not treat
16 Plaintiff's swollen testicles, swollen wrist, and pain. (*Id.*) Plaintiff was denied and
17 delayed medical care for sixteen days. (*Id.*) Plaintiff also alleges that Mace fabricated
18 CDCR7219 in order to conceal Mill's and Barra's actions. (*Id.* at 10-11.)

19 On August 12, 2010, Plaintiff was placed in administrative segregation.
20 According to Plaintiff, he suffered swelling, causing him to be unable to sleep, walk,
21 close his legs, or urinate without pain. (*Id.* at 13.) He was removed from administrative
22 segregation on August 27, 2010 and placed in central medical before being taken to
23 Pioneers Memorial Healthcare District, where he was diagnosed with testicular
24 swelling and dysfunction. (*Id.*)

25
26 ¹ Plaintiff attempted to submit two Objections. One dated November 5, 2013, in which Plaintiff
27 states he has not yet received the actual R&R but that he objects to each and every aspect that is not
28 in his favor (*hereinafter* "Objection 1"). This Objection does not appear on the docket but will be filed
along with this Order. The second dated November 6, 2013, in which Plaintiff states he has received
the R&R. (Doc. No. 289.) The Court will consider both of these documents in ruling on the instant
matter.

1 **A. Plaintiff's Administrative Appeal**

2 Plaintiff commenced an administrative action on November 6, 2010 by filling
3 out a Form 602 grievance regarding medical care, alleging that Mace witnessed the
4 assault and fabricated CDCR 7219 to conceal the other Defendants' actions. (Doc. No.
5 249 at 34). Plaintiff requested Mace be held liable for the physical and emotional
6 injury resulting from her failure to provide adequate medical care. (*Id.*) The appeal was
7 not given a log number.

8 On November 18, 2010, Plaintiff's first level of appeal was screened out by the
9 Calipatria Appeals Coordinator in a written notice. (*Id.* at 38.) Plaintiff's appeal was
10 returned to him because "there [was] too great a time lapse between when the action
11 or decision occurred and when [Plaintiff] filed [his] appeal with no explanation of why
12 [he] did not or could not file in a timely fashion." (*Id.*) The notice instructed Plaintiff
13 to submit an explanation and supporting documentation explaining why he did not or
14 could not file his appeal timely in order to further pursue his appeal. (*Id.*) Plaintiff was
15 to do so within fifteen working days. (*Id.*)

16 On December 6, 2010, Plaintiff submitted Section D of Plaintiff's unnumbered
17 appeal, explaining why he did not timely submit the appeal. (*Id.* at 40.) Plaintiff stated
18 that he was waiting on all of the 115 hearing documents concerning battery on staff,
19 which he received on September 20, 2010. (*Id.*) Plaintiff also wrote that there was an
20 investigation occurring at the same time related to his appeal Log No. CAL-A-10-1870
21 and that he was waiting until the investigation was over in order to support his medical
22 care appeal. (*Id.*)

23 On December 13, 2010, Plaintiff's unnumbered appeal was cancelled. (*Id.* at
24 44.) The decision letter stated that "[y]our explanation for submitting an untimely
25 appeal is noted; however, it is not a valid or compelling argument to forward your
26 appeal . . . Your appeal remains untimely. DO NOT RESUBMIT THIS APPEAL. This
27 appeal has been cancelled and the original has been kept on file." (*Id.*) The letter
28 further stated that "[o]nce an appeal has been cancelled that appeal may not be

1 resubmitted. However a separate appeal can be filed on the cancellation decision. The
2 original appeal may only be resubmitted if the appeal on the cancellation decision is
3 granted.” (*Id.*) There is no evidence that Plaintiff appealed the cancellation decision
4 or pursued this appeal any further before filing the instant action.

5 **B. Plaintiff’s Complaint and Service Against Mace**

6 On December 10, 2010, Plaintiff filed his original complaint in federal court
7 against all defendants, including Mace, for violations of his civil rights under 42 U.S.C.
8 § 1983. (Doc. No. 1.) On February 10, 2011, Plaintiff filed a first amended complaint
9 (“FAC”). (Doc. No. 7). On June 6, 2011, Plaintiff’s service of the FAC and summons
10 for Mace were returned unexecuted, with remarks that Mace no longer worked at the
11 institution. (Doc. No. 16.) On August 12, 2011, Plaintiff filed a second amended
12 complaint (“SAC”) against all defendants. The Court found that service of process
13 was not properly conducted by the U.S. Marshal for Mace and ordered that the U.S.
14 Marshal personally serve the summons and the SAC to Mace at a confidential address.
15 (Doc. No. 134, at 3-4; Doc. No. 135.) The Marshal was unable to execute service due
16 to an erroneous address. The Court then ordered the Attorney General assigned to the
17 case to provide an available forwarding address to the Marshal for service of Mace.
18 (Doc. No. 135.) On April 13, 2012, Deputy Attorney General Sylvie Snyder submitted
19 a declaration in response stating that the address previously given to the Marshal was
20 the only address on file for Mace. (Doc. No. 141.)

21 On April 12, 2012, Plaintiff filed the TAC against all Defendants. (Doc. No.
22 138.) Service on Mace was returned unexecuted as the last known address was
23 incorrect. (Doc. No. 157.) On April 4, 2013, the FAC summons for Mace was filed as
24 executed by personal service, marked delivered on March 14, 2013 at the California
25 Men’s Colony in San Luis Obispo and signed by Joseph Hurtle, an inmate at Calipatria
26 State Prison. (Doc. No. 246.) The Court issued an order to show cause to Plaintiff as
27 to why the Court should not dismiss Mace pursuant to Rule 4(m) of the Federal Rules
28 of Civil Procedure for want of prosecution. (Doc. No. 248). Subsequent to that order,

1 on April 23, 2013, Mace filed a motion to dismiss Plaintiff's TAC. (Doc. No. 249).
2 During the May 23, 2013 hearing on the order to show cause, counsel for Mace
3 indicated that Mace preferred to have the matter decided on the merits pursuant to the
4 motion to dismiss. (Doc. No. 261.) The Court thereby vacated the order to show cause.

5 In her motion to dismiss the TAC, Defendant Mace argues that: (1) Plaintiff's
6 service of process was insufficient; (2) Plaintiff's service of process was untimely; and
7 (3) Plaintiff failed to exhaust his administrative remedies prior to filing his complaint.
8 (Doc. No. 249 at 6.) Plaintiff contends that service on Mace was properly effective as
9 he received a summons returned executed by Joseph Hurre, and subsequently filed that
10 summons with the Court. (Doc. No. 274 at 2.) Plaintiff requests that default judgment
11 be entered against Mace in the amount of \$48.6 million dollars as she failed to timely
12 file an answer. (*Id.* at 2-4.) Plaintiff acknowledges that he failed to timely file an
13 appeal and thereby failed to exhaust his administrative remedies, but argues he only did
14 so as a result of misconduct on the part of prison staff handling his appeal. (*Id.* at 16.)

15 The Court now considers the analysis and conclusions of the R&R in the order
16 presented by Magistrate Judge Skomal. (Doc. No. 284.) Judge Skomal recommends
17 this Court grant Defendant Mace's motion to dismiss the TAC for failure to exhaust
18 administrative remedies without prejudice and without leave to amend. (*Id.* at 19.)
19 Judge Skomal also presents the Court with several alternative options should the Court
20 decline to adopt this particular recommendation. For the following reasons, the Court
21 ADOPTS the R&R's conclusion that Plaintiff failed to properly exhaust his
22 administrative remedies and GRANTS Defendant's motion to dismiss on this basis.

23 **II. LEGAL STANDARD**

24 **A. District Court's Review of a Magistrate Judge's R&R**

25 A district court has jurisdiction to review a magistrate judge's R&R's on
26 dispositive matters. Fed. R. Civ. P. 72(b). "The district judge must determine de novo
27 any part of the magistrate judge's disposition that has been properly objected to." *Id.*
28 "A judge of the court may accept, reject, or modify, in whole or in part, the findings or

1 recommendations made by the magistrate judge.” 28 U.S.C. § 636(b)(1). The Court
 2 reviews de novo those portions of the R&R to which specific written objection is made.
 3 *United States v. Reyna-Tapio*, 328 F.3d 1114, 1121 (9th Cir. 2002) (en banc). “The
 4 statute makes it clear that the district judge must review the magistrate judge’s findings
 5 and recommendations de novo if objection is made, but not otherwise.” *Id.*

6 **B. Motion to Dismiss for Failure to Exhaust Administrative Remedies**

7 The Ninth Circuit recognizes an unenumerated Fed. R. Civ. P. 12(b) motion to
 8 dismiss based on the failure to exhaust administrative remedies. *See Stratton v. Buck*,
 9 697 F.3d 1004, 1008 (9th Cir. 2012). The Prison Litigation Reform Act of 1995
 10 provides that:

11 [n]o action shall be brought with respect to prison conditions [under 42
 12 U.S.C. § 1983], or any other Federal law, by a prisoner confined in any
 13 jail, prison, or other correctional facility until such administrative
 14 remedies as are available are exhausted.

15 42 U.S.C. § 1997e(a). “The doctrine of exhaustion of administrative remedies is well
 16 established in the jurisprudence of administrative law. *McKart v. United States*, 395
 17 U.S. 185, 193, 89 S. Ct. 1657 (1967). “The doctrine provides that no one is entitled to
 18 judicial relief for a supposed or threatened injury until the prescribed administrative
 19 remedy has been exhausted. *Woodford v. Ngo*, 548 U.S. 81, 89, 126 S. Ct. 2378 (2006)
 20 (internal citation and quotation marks omitted).

21 The doctrine serves two purposes. “First, exhaustion protects ‘administrative
 22 agency authority.’” *Id.* It gives the agency an “opportunity to correct its own mistakes
 23 with respect to the programs it administers before it is haled into federal court.”
 24 “Second, exhaustion promotes efficiency,” as claims can be resolved more quickly and
 25 economically as compared to litigation in federal court. *Id.* (internal citations and
 26 quotation marks omitted). Statutes requiring exhaustion are useful when a significant
 27 number of aggrieved parties, if given the choice, would not voluntarily exhaust. Some
 28 aggrieved parties may prefer to proceed directly to federal court for a number of
 reasons, including bad faith. *Id.* (citing *Thomas v. Woolum*, 337 F.3d 720, 752 (6th Cir.
 2003) (Rosen, J., dissenting in part and concurring in judgment)).

“In deciding a motion to dismiss for a failure to exhaust nonjudicial remedies, the court may look beyond the pleadings and decide disputed issues of fact.” *Wyatt v. Terhune*, 315 F.3d 1108, 1119-20 (9th Cir. 2003). If the district court concludes that the prisoner failed to exhaust, the claim should be dismissed without prejudice. *O’Guinn v. Lovelock Corr. Ctr.*, 502 F.3d 1056, 1059, (9th Cir. 2007). Failure to exhaust may not be waived. *Woodford*, 548 U.S. at 85-86. Under the PLRA, “exhaustion is mandatory . . . unexhausted claims cannot be brought in court.” *Jones v. Bock*, 549 U.S. 199, 211 (2007). Nor can a prisoner who did not attempt to utilize the complete prison grievance system sidestep the exhaustion requirement by arguing that it would be futile to attempt to exhaust within the prison system. *Booth v. Churner*, 532 U.S. 731, 741 n.6 (2002) (“we stress the point . . . that we will not read futility or other exceptions into statutory exhaustion requirements where Congress has provided otherwise”).

III. DISCUSSION

After considering the evidence regarding Plaintiff’s administrative appeal, Judge Skomal concluded that Plaintiff failed to exhaust his administrative remedies with respect to his claims against Mace. As Plaintiff “objects to each and every aspect that is not in his favor,” this Court will review de novo Judge Skomal’s findings. (Objection 1.)

A. California’s Prisoner Grievance Process

California has a “relatively simple” grievance process for prisoners who seek to challenge the conditions of confinement. *See Woodford*, 584 U.S. at 85. In 2010, under the regulations in place when Plaintiff filed his 602 form, to exhaust the grievance process, a prisoner must proceed through several levels of appeal:² (1) informal resolution; (2) formal written appeal on a CDC 602 inmate appeal (“Form 602”); (3) second level of appeal to the institution head or designee; and (4) third level appeal to

² In 2011, the California Department of Corrections and Rehabilitation inmate formal administrative appeals process underwent a major revision, including the discontinuation of the informal appeal process. *See* 2011 CA REG TEXT 248824 (NS.)

1 the Director of the California Department of Corrections and Rehabilitation
2 (“Director”).³ Cal. Code Regs. Tit. 15, § 3084.5; *Woodford*, 584 U.S. at 85-86.

3 In the Ninth Circuit, an inmate exhausts his administrative remedies when no
4 pertinent relief remains available to him through the prison appeal process. *Brown v.*
5 *Valoff*, 422 F.3d 926, 936-37 (9th Cir. 2005). In California, an appeals coordinator
6 screens each appeal before forwarding it for review on the merits. Cal. Code Regs. tit
7 15, § 3084.3. The appeals coordinator may screen out an inmate appeal for several
8 reasons, including untimeliness or incompleteness. *Id.* When an appeal is screened out,
9 the inmate must be notified of the reasons for the rejection and the corrections that are
10 needed in order for the appeal to be accepted. *Id.* In general, an inmate must file an
11 appeal or amended appeal within fifteen working days of the disputed or adverse
12 action. *Id.* § 3084.6(c).

13 The Ninth Circuit has suggested that an inmate should challenge an improper
14 screening. *See Sapp v. Kimbrell*, 623 F.3d 813, 826 (9th Cir. 2010) (noting that if
15 plaintiff thought officials improperly screened out his appeal, he could have contested
16 that decision “as boilerplate text at the bottom of the screening form advised him to do
17 so”); *see also Smiley v. Martinez*, 2010 WL 309459, *3 (N.D. Cal. 2010) (plaintiff did
18 not timely challenge the screening of his appeals based on untimeliness and
19 duplication). These authorities are in accord with the Supreme Court’s holding that
20 proper exhaustion under the PLRA requires compliance with all the prison’s deadlines
21 and critical procedural rules. *Woodford*, 584 U.S. at 90-91.

22 **B. Plaintiff’s Administrative Appeals**

23 As noted above, Plaintiff’s first level appeal was screened out on November 18,
24 2010, by the Calipatria Appeals Coordinator in a written notice for failure to file within
25 fifteen working days of the incident. The alleged incident occurred on August 12, 2010
26 and Plaintiff was diagnosed with testicular swelling and dysfunction after he was
27

28 ³ For a more detailed discussion on California prisoner appeal process, the Court directs the
readers attention to Judge Skomal’s R&R. (Doc. No. 284 at 8-10.)

1 removed from administrative segregation on August 27, 2010. By the time of filing on
2 November 6, 2010, more than fifteen working days had passed. Plaintiff was directed
3 to submit an explanation and supporting documentation explaining why he did not or
4 could not file a timely appeal in order to further pursue his appeal. (Doc. No. 249 at
5 38.) Plaintiff had fifteen working days to do so. In response, Plaintiff submitted
6 Section D on December 6, 2010, stating he was waiting for all of the 115 hearing
7 documents concerning battery on staff, which he finally received on September 20,
8 2010. (*Id.* at 40.) Plaintiff also stated that there was an investigation occurring at the
9 time related to his appeal Log No. CAL-A-10-1870, therefore he was waiting until the
10 investigation was over. (*See* Objections 1 at 18.) Plaintiff hoped to support his medical
11 claim with documents from that investigation. (*Id.*) As of the issuance of the R&R,
12 Plaintiff is unsure whether the investigation is still pending. (*Id.*) Plaintiff “waited and
13 waited” and as he was not “contacted by them, [he] went on and filed the 602 on
14 November 6, 2010. (*Id.*)

15 Plaintiff concedes that he filed his grievance past the deadline. However,
16 Plaintiff contends that his appeal was in regards to employee misconduct, which has
17 a one year deadline for filing from the time of misconduct. (Objection 1 at 16.)
18 Plaintiff directed the Court to a letter from the Calipatria Appeals Coordinator dated
19 December 13, 2010 regarding the screening at the first level filed in connection with
20 his TAC. The letter stated:

21 “[y]our appeal was reviewed by the Chief Deputy Warden (CDW)/Hiring
22 Authority in order to determine if your complaint met the requirements to
23 be classified as a staff complaint. Upon conclusion of the CDW’s review
24 it was noted that your appeal did not meet the criteria to be classified as
a staff complaint. Therefore, the appeal has been classified as a Legal
appeal issue, and will be addressed as such.”

25 Attached to that letter was CDC 965 screening form, explaining Plaintiff’s appeal was
26 untimely and directing him to submit an explanation and supporting documentation
27 accounting for the untimeliness. (Doc. No. 138 at 41-42.) The letter went on to say that
28 Plaintiff’s explanation was noted, however it was invalid and a non-compelling reason
to forward the appeal. Finally, the letter explained that once an appeal had been

1 cancelled, that appeal may not be resubmitted but a separate appeal on the cancellation
2 decision can be filed. (*Id.*)

3 Judge Skomal found, and this Court agrees, that there is no evidence that
4 Plaintiff appealed the cancellation of the appeal or pursued his appeal further in the
5 administrative grievance system. Moreover, no evidence exists that would show
6 Plaintiff was unable to submit a timely appeal of the cancellation decision to the second
7 level within the time prescribed by Cal. Code Regs tit. 15 § 3084.6(c). If Plaintiff took
8 issue with the classification of his appeal as “legal” instead of “employee misconduct,”
9 he could have timely filed an appeal of the cancellation based on such an argument.

10 Plaintiff’s Objection goes on to state that prison officials took advantage of the
11 exhaustion requirement when the prison employees engaged in affirmative misconduct
12 to prevent Plaintiff from exhausting. (Objection 1 at 20.) While the Court is
13 sympathetic to Plaintiff’s position, there is simply no evidence to support his
14 contention that prison officials engaged in any bad faith or misconduct to obstruct his
15 appeals process. Indeed, when Plaintiff filed his first level appeal on November 6,
16 2010, it was immediately reviewed and screened out by November 18, 2010. That
17 written notice contained an advisory note that Plaintiff had fifteen days to submit an
18 explanation and supporting documents as to why he did not or could not timely file.
19 (Doc. No. 249 at 38.) Based on the record before it, the Court finds that after Plaintiff
20 started the appeals process, each of his submissions was met with a timely response and
21 instructions therein of what his next step should be.

22 The Court also agrees with Judge Skomal’s determination that Plaintiff failed to
23 exhaust his administrative remedies even if his account of prison official misconduct
24 were true. (Doc. No. 284 at 12.) Plaintiff failed to mention any misconduct in his
25 Section D response explaining why he failed to timely appeal. (Doc. No. 274 at 21.)
26 Moreover, the administrative review was still available to Plaintiff, despite any alleged
27 misconduct, as the cancellation letter dated December 13, 2010 advised him that he
28 may file a separate appeal of the cancellation decision. Therefore, if Plaintiff believed

1 the cancellation of his appeal was improper, he could have contested that decision as
 2 the letter contained “boilerplate text” that advised him of the option to do so. *See Sapp*,
 3 623 F.3d 813. Accordingly, Plaintiff failed to pursue further appeal remedies as to
 4 Mace after being advised that the appeal had been cancelled.

5 After a de novo review of the parties’ contentions and the record before it, the
 6 Court ultimately agrees with Judge Skomal’s finding that Plaintiff’s medical care
 7 grievance was untimely and that he failed to satisfy the PRLA’s exhaustion
 8 requirement. (Doc. No. 284 at 12.) The Court OVERRULES Plaintiff’s objections and
 9 GRANTS Defendant Mace’s motion to dismiss the TAC for failure to exhaust
 10 administrative remedies without prejudice and without leave to amend.⁴

11 **C. Plaintiff’s Request for Referral to Mediation Program**

12 In Plaintiff’s response in opposition to Mace’s motion to dismiss as well as his
 13 objection to the R&R, Plaintiff includes a “stipulation to request court to refer case to
 14 pro se mediation program with Magistrate Judge Vadas.” (Doc. No. 278 at 8;
 15 Objections 1 at 7.) Plaintiff states that both parties discussed and agree to request the
 16 court to refer this case to the prisoner pro se mediation program.

17 Although Plaintiff suggests that this is a joint request by both parties, the request
 18 is only signed by Plaintiff, with space for defense counsel’s signatures left blank.
 19 Moreover, Mace’s Reply fails to address this request, let alone affirm it. (*See* Doc. No.
 20 290.) “The filer of any joint motion of other documents requiring more than one
 21 signature must certify that the content of the document is acceptable to all persons
 22 required to sign the document by obtaining either physical signatures or authorization
 23 for the electronic signature of all parties on the document.” *Electronic Case Filing*
 24 *Administrative Policies and Procedures Manual*, Section 2(f)(4) (May 6, 2013.) As
 25 neither Defendant Mace nor her counsel has certified that the content of the joint
 26 request is acceptable by signing the document, the Court DENIES Plaintiff’s request.

27
 28 ⁴ The Court is able to dispose of the entire matter based on exhaustion of remedies, thus the
 Court declines to address Mace’s motion to dismiss for insufficient and/or untimely service of process
 as both are rendered moot.

1 **IV. CONCLUSION**

2 For the above foregoing reasons, the Court adopts Magistrate Judge Skomal's
3 well reasoned R&R in its entirety. The Court hereby:

4 1) GRANTS Defendant Mace's motion to dismiss Plaintiff's TAC for failure to
5 exhaust administrative remedies WITHOUT PREJUDICE and WITHOUT LEAVE TO
6 AMEND;

7 2) OVERRULES Plaintiff's Objections;


8 3) DENIES Plaintiff's motion for default judgment against Defendant Mace; and

9 4) DENIES Plaintiff's request for referral to mediation program.

10 As all Defendants are terminated in this case, the Clerk of Court is instructed to
11 close the above captioned action.

12 IT IS SO ORDERED.

13
14 DATED: January 2, 2014

15 
16 Hon. Anthony J. Battaglia
17 U.S. District Judge
18
19
20
21
22
23
24
25
26
27
28